STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2003
v	No. 237899 Muskegon Circuit Court
MELSHAN BIAMA GRANT, Defendant-Appellant.	LC No. 01-046023-FH

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of unarmed robbery, MCL 750.530. He was sentenced as a fourth habitual offender, MCL 769.12, to 15 years to 50 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues on appeal that the trial court abused its discretion when it permitted the prosecutor to introduce evidence of defendant's two prior unarmed robberies in 1993 because this evidence was neither material nor probative of any fact of consequence and, therefore, was not relevant. We disagree.

MRE 401 defines relevant evidence as that evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Thus, to be relevant evidence must be both material, i.e., related to any fact that is of consequence to the action, and probative, i.e., tending to make that fact more ore less probable than it would be without the evidence. *People v Crawford*, 458 Mich 376, 388-390; 582 NW2d 785 (1998).

With regard to the element of materiality, defendant asserts that the evidence of defendant's prior unarmed robbery offenses was not material because defendant did not argue a defense negating motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident. However, it is well established in Michigan that all elements of a criminal offense are "in issue," and thus are material, when a defendant enters a plea of not guilty. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). This is so even if the defendant does not specifically dispute one or more of the elements of the crime with which he is charged, because nonetheless the prosecution must carry the burden of proving every element beyond a reasonable doubt. *Crawford*, at 389. In the present case defendant did, in fact, plead not guilty, thus placing all elements of the charged offense in issue.

Moreover, in this case the prosecution's primary theory was that defendant aided and abetted in the unarmed robbery of Strevel's Market, which occurred on May 1, 2001. Unarmed robbery is a specific intent crime. *People v Dupie*, 395 Mich 483; 236 NW2d 494 (1975). To convict a defendant of aiding and abetting in the commission of a specific intent crime, the prosecution must prove that such person had either the specific intent required of a principal of the crime, or the knowledge that a principal had such intent. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995). Thus, defendant's intent, too, was put in issue by defendant's general denial of guilt. Under these circumstances, we find that the evidence of defendant's prior unarmed robberies was material.

Having determined that the proffered evidence was material, however, does not automatically render it relevant. Rather, to be relevant the evidence of defendant's prior unarmed robbery offenses must also have been probative. *People v Sabin (On Remand)*, 463 Mich 43, 62; 614 NW2d 888 (2000). With regard to this issue, defendant argues that the proffered evidence was not probative, because the prior acts about which the prosecution desired to introduce evidence were not sufficiently similar to the crime with which defendant had been charged to be probative of a common scheme, plan or system.

On this point our Supreme Court has held that evidence of similar misconduct is logically relevant to show that a charged act occurred where the other act and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system. *Sabin*, at 63. That Court further has held that logical relevance in such cases is not limited to circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. *Id.*, at 64. However, a general similarity between the charged offense and the other act does not, by itself, establish that a plan, scheme, or system was used to commit the acts. *Id.* Rather, the two acts must share common features beyond the mere fact that both are the same type of act or crime. *Id.*, at 66. Indeed, the two acts must have a high degree of similarity. *Id.*, at 65.

In the present case, the offense with which defendant was charged and defendant's two prior unarmed robberies were extremely similar. All three involved defendant convincing a second party to rob a retail establishment. All three involved the second party robbing the store by stealing money from the register after getting the clerk to open the cash drawer on some pretext. All three involved defendant waiting outside in a car to provide a fast getaway once the crime was committed. Accordingly, we find that the charged offense and defendant's two prior unarmed robbery offenses were sufficiently similar to support an inference that they were manifestations of a common plan, scheme, or system. *Sabin* at 63. Thus, we hold that the trial court did not abuse its discretion when it ruled that evidence of defendant's prior unarmed robbery convictions was relevant and admissible.

Defendant next argues that the trial court abused its discretion when it ruled that evidence of defendant's prior conspiracy to embezzle conviction was admissible for impeachment purposes because, defendant claims, the crime of conspiracy contains no element of theft or dishonesty. However we note that in order to preserve for review the issue of improper impeachment by a prior conviction for review, a criminal defendant in Michigan must testify at trial. *People v Finley*, 431 Mich 506, 521; 431 NW2d 19 (1988). In this case defendant did not testify at trial. As a result, pursuant to *Finley*, defendant has not preserved this issue for appeal. Accordingly, we will not review this issue further.

Defendant next argues that the trial court abused its discretion when it admitted testimony regarding a crack cocaine pipe found by the police in the trunk of defendant's car at the time he was arrested for the charged offense, because this evidence was not relevant to any fact in issue in the case, nor did it tend to prove any element of the charged offense. Once again, however, we disagree.

The prosecution, in this case, sought to introduce evidence of the crack pipe in order to demonstrate a motive for defendant to have committed the crime with which he was charged. At trial, defendant's accomplice Foster testified as a prosecution witness that he and defendant had agreed to smoke crack cocaine on the day of the robbery, and they agreed to commit a robbery and split the proceeds evenly. Our Supreme Court, in *Sabin*, noted that evidence of a defendant's motive to commit the charged offense is relevant to show the elements of identity, *actus reus* and *mens rea*. *Sabin,* at 67-68. Pursuant to *Sabin,* thus, the challenged evidence was relevant.

Moreover, common sense also dictates that this is so. In order to convict a defendant of a charged offense, the prosecution must prove each element of the offense beyond a reasonable doubt. *In re Winship,* 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). For the crime of unarmed robbery these elements are: (1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed. *People v Johnson,* 206 Mich App 122, 125-126; 520 NW2d 672 (1994). Unarmed robbery is a specific intent crime. *Dupie*, at 487. By demonstrating that defendant had a motive to commit the robbery, the prosecution makes it more probable both that defendant committed the crime and that he had the requisite intent to commit the offense. Accordingly, it is obvious that evidence demonstrating motive has a tendency to make a fact that is of consequence to the determination of the action more or less probable. Therefore, this evidence was relevant and admissible under MRE 401. As a result, we find that the trial court did not abuse its discretion when it permitted evidence regarding the finding of a crack pipe in defendant's trunk to be admitted.

Defendant next asserts that the evidence was insufficient to support defendant's conviction for unarmed robbery because the prosecution failed to prove beyond a reasonable doubt that defendant escaped. This argument, however, is based on a misinterpretation of the law and we, therefore, disagree.

It is true that until recently this Court followed the so-called "transactional approach" in determining whether the evidence was sufficient to support a conviction for robbery. *People v Randolph*, 466 Mich 532, 535; 648 NW2d 164 (2002). Under this approach, a defendant was required to complete his escape with the stolen merchandise or he could not be convicted of robbery. *Id.*; *People v Turner,* 120 Mich App 23, 28; 328 NW2d 5 (1982). However, in *Randolph*, the Michigan Supreme Court explicitly overturned *Turner,* and abandoned the "transactional approach" previously followed by this Court. *Randolph*, at 546. In so doing, the Court specifically stated, albeit in dicta, that "escape is not an element of robbery." *Id.*, at 547, n 17. We recognize that the question in *Randolph* focused on when the use of force was required to occur in order for a defendant to be convicted of robbery. Nonetheless it is clear from the *Randolph* opinion that the Court, in abrogating the "transactional approach," was not only disavowing the reasoning that the use of force in making an escape, without any prior use of force, was sufficient to support a conviction for robbery, but also was abandoning the idea that a

defendant had to make good his escape in order to be convicted of robbery. Accordingly, defendant's argument must fail.

Defendant next argues that his sentence constituted cruel and unusual punishment because it was unusually excessive. Again, we disagree.

We first note that, because the crime of which defendant was convicted was committed after January 1, 1999, the legislative guidelines apply to this case. *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000), after rem 250 Mich App 463 (2002). With regard to appellate review of a defendant's sentence, this Court has held that if the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the sentencing guidelines or absent inaccurate information relied upon in determining defendant's sentence. MCL 769.34(1), *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000). The sentence range specified by the legislative guidelines, as agreed with by defendant at sentencing, was 50 to 200 months. Defendant was sentenced to 15 to 50 years' imprisonment. Defendant's minimum sentence, equivalent to 180 months' imprisonment, thus, was within the sentence range specified by the legislative guidelines. Moreover, defendant has not asserted on appeal that the sentencing guidelines were misscored or that inaccurate information was relied upon in determining defendant's sentence. Accordingly, we find that, in accordance with *Leversee*, defendant's sentence must be affirmed.

Finally, defendant argues that the trial court committed error mandating reversal when it failed to advise defendant of his right to appeal his sentence, as required by MCL 769.34(7), because, defendant asserts, defendant's sentence was longer and more severe than the appropriate sentence range. Once again, we disagree.

MCL 769.34(7) provides that if a trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court must advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range. It is uncontroverted, in this case, that the trial court did not give this advice of rights to defendant at sentencing. However, as discussed above, defendant was sentenced to incarceration for a minimum period of 15 years, or 180 months, a sentence well within the appropriate sentence range of 50 to 200 months set out in the legislative guidelines. Accordingly, because defendant's sentence was neither longer nor more severe than the appropriate sentence range, the trial court was not required to give defendant this advice of rights and, therefore, we find that the court's failure to do so did not constitute error.

Moreover, we note that even had the trial court erred in failing to give the advice of rights required by MCL 769.34(7), defendant would not be entitled to resentencing on this ground, because this error is harmless inasmuch as defendant has already appealed his sentence to this Court on the grounds that it is longer or more severe than the appropriate sentence range.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens